

IN THE DISTRICT COURT OF THE UNITED STATES  
FOR THE DISTRICT OF SOUTH CAROLINA  
ANDERSON/GREENWOOD DIVISION

Albert Antwan Hodges,	)	Civil Action No. 8:13-cv-03587-RMG-JDA
Plaintiff,	)	
	)	
vs.	)	<b><u>REPORT AND RECOMMENDATION</u></b>
	)	<b><u>OF MAGISTRATE JUDGE</u></b>
Carolyn W. Colvin,	)	
Commissioner of Social Security,	)	
	)	
Defendant.	)	

This matter is before the Court for a Report and Recommendation pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 73.02(B)(2)(a), D.S.C.<sup>1</sup> Plaintiff brought this action pursuant to 42 U.S.C. §§ 405(g) and 1383(c)(3) to obtain judicial review of a final decision of the Commissioner of Social Security (“the Commissioner”), denying Plaintiff’s claims for disability insurance benefits (“DIB”) and supplemental security income (“SSI”).<sup>2</sup> For the reasons set forth below, it is recommended that the decision of the Commissioner be reversed and remanded for administrative action consistent with this recommendation, pursuant to sentence four of 42 U.S.C. § 405(g).

**PROCEDURAL HISTORY**

On April 15, 2010, Plaintiff filed concurrent applications for DIB and SSI alleging disability beginning July 13, 2009. [R.132–44.] Plaintiff’s claims were denied initially and

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<sup>1</sup>A Report and Recommendation is being filed in this case, in which one or both parties declined to consent to disposition by a magistrate judge.

<sup>2</sup> Section 1383(c)(3) provides, “The final determination of the Commissioner of Social Security after a hearing under paragraph (1) shall be subject to judicial review as provided in section 405(g) of this title to the same extent as the Commissioner’s final determinations under section 405 of this title.” 42 U.S.C. § 1383(c)(3).

upon reconsideration by the Social Security Administration (“the Administration”). [R. 59–65.] Plaintiff requested a hearing before an administrative law judge (“ALJ”), and on January 26, 2012, ALJ Rosanne P. Gudzan conducted a de novo hearing on Plaintiff’s claims. [R. 33–58.]

The ALJ issued a decision on June 12, 2012, finding Plaintiff not disabled under the Social Security Act (“the Act”). [R. 22–32.] At Step 1,<sup>3</sup> the ALJ found Plaintiff met the insured status requirements of the Act through December 31, 2012, and he had not engaged in substantial gainful activity since July 13, 2009, the alleged onset date. [R. 24, Findings 1 & 2.] At Step 2, the ALJ found Plaintiff had severe impairments of: sickle cell disease (“SCD”) and asthma. [R. 24, Finding 3.] At Step 3, the ALJ determined Plaintiff did not have an impairment or combination of impairments that met or medically equaled the criteria of one of the impairments listed in 20 C.F.R. Part 404, Subpart P, Appendix 1. [R. 24, Finding 4.] The ALJ specifically considered Listings 3.00, 3.02, 3.03, 7.00, and 7.05. [R. 25, Finding 4.]

Before addressing Step 4, Plaintiff’s ability to perform his past relevant work, the ALJ found Plaintiff retained the following residual functional capacity (“RFC”):

After careful consideration of the entire record, the undersigned finds that the claimant has the residual functional capacity to perform a range of sedentary work as defined in 20 CFR 404.1567(a) and 416.967(a). Specifically, the claimant is able to lift, carry, push and pull up to 10 pounds occasionally and 5 pounds frequently, sit for 6 hours and stand and walk a total of 2 hours in an 8-hour workday with normal breaks. The claimant is able to perform postural movements occasionally, except he should never climb ladders, ropes or scaffolds, balance for

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<sup>3</sup>The five-step sequential analysis used to evaluate disability claims is discussed in the Applicable Law section, *infra*.

safety, such as on dangerous or slippery surfaces, crouch or crawl. He should avoid concentrated exposure to respiratory irritants and extremes of cold. He should never work around hazards such as unprotected heights and dangerous moving machinery.

[R. 25–26, Finding 5.] Based on this RFC, at Step 4, the ALJ determined Plaintiff was unable to perform his past relevant work as a machine operator, forklift operator, hospital floor technician, fast food worker, or cafeteria attendant. [R. 30, Finding 6.] Considering Plaintiff's age, education, work experience, and RFC, the ALJ determined that there were jobs that existed in significant numbers in the national economy that Plaintiff could perform. [R. 30, Finding 10.] Accordingly, the ALJ concluded Plaintiff has not been under a disability, as defined by the Act, from June 26, 2009, through the date of the decision. [R. 31, Finding 11.]

Plaintiff requested Appeals Council review of the ALJ's decision, and the Council declined review. [R. 6–10.] Plaintiff filed this action for judicial review on December 26, 2013. [Doc. 1.]

### **THE PARTIES' POSITIONS**

Plaintiff contends the ALJ's decision is not supported by substantial evidence and claims the ALJ erred by

1. failing to follow the treating physician rule in assigning "little weight" to the opinion of Plaintiff's treating physician Dr. Barry Lee ("Dr. Lee") and "great weight" to the opinion of a single non-treating, non-examining state agency medical consultant [Doc. 9 at 8–12] and
2. failing to properly evaluate Plaintiff's credibility with respect to his alleged symptoms [*id.* at 12–16].

The Commissioner, on the other hand, contends the ALJ's decision is supported by substantial evidence because the ALJ

1. permissibly weighted the evidence of record, including Dr. Lee's opinion [Doc. 10 at 7–17], and
2. adequately explained her determination as to Plaintiff's credibility in accordance with regulations [*id.* at 17–23].

### **STANDARD OF REVIEW**

The Commissioner's findings of fact are conclusive if supported by substantial evidence. 42 U.S.C. § 405(g). Substantial evidence is more than a scintilla—i.e., the evidence must do more than merely create a suspicion of the existence of a fact and must include such relevant evidence as a reasonable person would accept as adequate to support the conclusion. See *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)); *Laws v. Celebrezze*, 368 F.2d 640, 642 (4th Cir. 1966) (citing *Woolridge v. Celebrezze*, 214 F. Supp. 686, 687 (S.D.W. Va. 1963)) (“Substantial evidence, it has been held, is evidence which a reasoning mind would accept as sufficient to support a particular conclusion. It consists of more than a mere scintilla of evidence but may be somewhat less than a preponderance. If there is evidence to justify a refusal to direct a verdict were the case before a jury, then there is ‘substantial evidence.’”).

Where conflicting evidence “allows reasonable minds to differ as to whether a claimant is disabled, the responsibility for that decision falls on the [Commissioner] (or the [Commissioner's] designate, the ALJ),” not on the reviewing court. *Craig v. Chater*, 76 F.3d 585, 589 (4th Cir. 1996); see also *Edwards v. Sullivan*, 937 F.2d 580, 584 n.3 (11th Cir. 1991) (stating that where the Commissioner's decision is supported by substantial

evidence, the court will affirm, even if the reviewer would have reached a contrary result as finder of fact and even if the reviewer finds that the evidence preponderates against the Commissioner's decision). Thus, it is not within the province of a reviewing court to determine the weight of the evidence, nor is it the court's function to substitute its judgment for that of the Commissioner so long as the decision is supported by substantial evidence. See *Bird v. Comm'r*, 699 F.3d 337, 340 (4th Cir. 2012); *Laws*, 368 F.2d at 642; *Snyder v. Ribicoff*, 307 F.2d 518, 520 (4th Cir. 1962).

The reviewing court will reverse the Commissioner's decision on plenary review, however, if the decision applies incorrect law or fails to provide the court with sufficient reasoning to determine that the Commissioner properly applied the law. *Myers v. Califano*, 611 F.2d 980, 982 (4th Cir. 1980); see also *Keeton v. Dep't of Health & Human Servs.*, 21 F.3d 1064, 1066 (11th Cir. 1994). Where the Commissioner's decision "is in clear disregard of the overwhelming weight of the evidence, Congress has empowered the courts to modify or reverse the [Commissioner's] decision 'with or without remanding the cause for a rehearing.'" *Vitek v. Finch*, 438 F.2d 1157, 1158 (4th Cir. 1971) (quoting 42 U.S.C. § 405(g)). Remand is unnecessary where "the record does not contain substantial evidence to support a decision denying coverage under the correct legal standard and when reopening the record for more evidence would serve no purpose." *Breeden v. Weinberger*, 493 F.2d 1002, 1012 (4th Cir. 1974).

The court may remand a case to the Commissioner for a rehearing under sentence four or sentence six of 42 U.S.C. § 405(g). *Sargent v. Sullivan*, 941 F.2d 1207 (4th Cir. 1991) (unpublished table decision). To remand under sentence four, the reviewing court must find either that the Commissioner's decision is not supported by substantial evidence

or that the Commissioner incorrectly applied the law relevant to the disability claim. See, e.g., *Jackson v. Chater*, 99 F.3d 1086, 1090–91 (11th Cir. 1996) (holding remand was appropriate where the ALJ failed to develop a full and fair record of the claimant’s residual functional capacity); *Brehem v. Harris*, 621 F.2d 688, 690 (5th Cir. 1980) (holding remand was appropriate where record was insufficient to affirm but was also insufficient for court to find the claimant disabled). Where the court cannot discern the basis for the Commissioner’s decision, a remand under sentence four is usually the proper course to allow the Commissioner to explain the basis for the decision or for additional investigation. See *Radford v. Comm’r*, 734 F.3d 288, 295 (4th Cir. 2013) (quoting *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985); see also *Smith v. Heckler*, 782 F.2d 1176, 1181–82 (4th Cir. 1986) (remanding case where decision of ALJ contained “a gap in its reasoning” because ALJ did not say he was discounting testimony or why); *Gordon v. Schweiker*, 725 F.2d 231, 235 (4th Cir. 1984) (remanding case where neither the ALJ nor the Appeals Council indicated the weight given to relevant evidence). On remand under sentence four, the ALJ should review the case on a complete record, including any new material evidence. See *Smith*, 782 F.2d at 1182 (“The [Commissioner] and the claimant may produce further evidence on remand.”). After a remand under sentence four, the court enters a final and immediately appealable judgment and then loses jurisdiction. *Sargent*, 941 F.2d 1207 (citing *Melkonyan v. Sullivan*, 501 U.S. 89, 102 (1991)).

In contrast, sentence six provides:

The court may . . . at any time order additional evidence to be taken before the Commissioner of Social Security, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding . . . .

42 U.S.C. § 405(g). A reviewing court may remand a case to the Commissioner on the basis of new evidence only if four prerequisites are met: (1) the evidence is relevant to the determination of disability at the time the application was first filed; (2) the evidence is material to the extent that the Commissioner's decision might reasonably have been different had the new evidence been before him; (3) there is good cause for the claimant's failure to submit the evidence when the claim was before the Commissioner; and (4) the claimant made at least a general showing of the nature of the new evidence to the reviewing court. *Borders v. Heckler*, 777 F.2d 954, 955 (4th Cir. 1985) (citing 42 U.S.C. § 405(g); *Mitchell v. Schweiker*, 699 F.2d 185, 188 (4th Cir. 1983); *Sims v. Harris*, 631 F.2d 26, 28 (4th Cir. 1980); *King v. Califano*, 599 F.2d 597, 599 (4th Cir. 1979)), *superseded by amendment to statute*, 42 U.S.C. § 405(g), *as recognized in Wilkins v. Sec'y, Dep't of Health & Human Servs.*, 925 F.2d 769, 774 (4th Cir. 1991).<sup>4</sup> With remand under sentence six, the parties must return to the court after remand to file modified findings of fact. *Melkonyan*, 501 U.S. at 98. The reviewing court retains jurisdiction pending remand and does not enter a final judgment until after the completion of remand proceedings. See *Allen v. Chater*, 67 F.3d 293 (4th Cir. 1995) (unpublished table decision) (holding that an

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<sup>4</sup>Though the court in *Wilkins* indicated in a parenthetical that the four-part test set forth in *Borders* had been superseded by an amendment to 42 U.S.C. § 405(g), courts in the Fourth Circuit have continued to cite the requirements outlined in *Borders* when evaluating a claim for remand based on new evidence. See, e.g., *Brooks v. Astrue*, No. 6:10-cv-152, 2010 WL 5478648, at \*8 (D.S.C. Nov. 23, 2010); *Ashton v. Astrue*, No. TMD 09-1107, 2010 WL 3199345, at \*3 (D. Md. Aug. 12, 2010); *Washington v. Comm'r of Soc. Sec.*, No. 2:08-cv-93, 2009 WL 86737, at \*5 (E.D. Va. Jan. 13, 2009); *Brock v. Sec'y of Health & Human Servs.*, 807 F. Supp. 1248, 1250 n.3 (S.D.W. Va. 1992). Further, the Supreme Court of the United States has not suggested *Borders'* construction of § 405(g) is incorrect. See *Sullivan v. Finkelstein*, 496 U.S. 617, 626 n.6 (1990). Accordingly, the Court will apply the more stringent *Borders* inquiry.

order remanding a claim for Social Security benefits pursuant to sentence six of 42 U.S.C. § 405(g) is not a final order).

### **APPLICABLE LAW**

The Act provides that disability benefits shall be available to those persons insured for benefits, who are not of retirement age, who properly apply, and who are under a disability. 42 U.S.C. § 423(a). “Disability” is defined as:

the inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 consecutive months.

*Id.* § 423(d)(1)(A).

#### **I. The Five Step Evaluation**

To facilitate uniform and efficient processing of disability claims, federal regulations have reduced the statutory definition of disability to a series of five sequential questions. *See, e.g., Heckler v. Campbell*, 461 U.S. 458, 461 n.2 (1983) (noting a “need for efficiency” in considering disability claims). The ALJ must consider whether (1) the claimant is engaged in substantial gainful activity; (2) the claimant has a severe impairment; (3) the impairment meets or equals an impairment included in the Administration’s Official Listings of Impairments found at 20 C.F.R. Pt. 404, Subpt. P, App. 1; (4) the impairment prevents the claimant from performing past relevant work; and (5) the impairment prevents the claimant from having substantial gainful employment. 20 C.F.R. §§ 404.1520, 416.920. Through the fourth step, the burden of production and proof is on the claimant. *Grant v. Schweiker*, 699 F.2d 189, 191 (4th Cir. 1983). The claimant must prove disability on or



before the last day of her insured status to receive disability benefits. *Everett v. Sec’y of Health, Educ. & Welfare*, 412 F.2d 842, 843 (4th Cir. 1969). If the inquiry reaches step five, the burden shifts to the Commissioner to produce evidence that other jobs exist in the national economy that the claimant can perform, considering the claimant’s age, education, and work experience. *Grant*, 699 F.2d at 191. If at any step of the evaluation the ALJ can find an individual is disabled or not disabled, further inquiry is unnecessary. 20 C.F.R. §§ 404.1520(a), 416.920(a)(4); *Hall v. Harris*, 658 F.2d 260, 264 (4th Cir. 1981).

#### **A. Substantial Gainful Activity**

“Substantial gainful activity” must be both substantial—involves doing significant physical or mental activities, 20 C.F.R. §§ 404.1572(a), 416.972(a)—and gainful—done for pay or profit, whether or not a profit is realized, *id.* §§ 404.1572(b), 416.972(b). If an individual has earnings from employment or self-employment above a specific level set out in the regulations, he is generally presumed to be able to engage in substantial gainful activity. *Id.* §§ 404.1574–.1575, 416.974–.975.

#### **B. Severe Impairment**

An impairment is “severe” if it significantly limits an individual’s ability to perform basic work activities. See *id.* §§ 404.1521, 416.921. When determining whether a claimant’s physical and mental impairments are sufficiently severe, the ALJ must consider the combined effect of all of the claimant’s impairments. 42 U.S.C. §§ 423(d)(2)(B), 1382c(a)(3)(G). The ALJ must evaluate a disability claimant as a whole person and not in the abstract, having several hypothetical and isolated illnesses. *Walker v. Bowen*, 889 F.2d

47, 49–50 (4th Cir. 1989) (stating that, when evaluating the effect of a number of impairments on a disability claimant, “the [Commissioner] must consider the combined effect of a claimant’s impairments and not fragmentize them”). Accordingly, the ALJ must make specific and well-articulated findings as to the effect of a combination of impairments when determining whether an individual is disabled. *Id.* at 50 (“As a corollary to this rule, the ALJ must adequately explain his or her evaluation of the combined effects of the impairments.”). If the ALJ finds a combination of impairments to be severe, “the combined impact of the impairments shall be considered throughout the disability determination process.” 42 U.S.C. §§ 423(d)(2)(B), 1382c(a)(3)(G).

**C. *Meets or Equals an Impairment Listed in the Listings of Impairments***

If a claimant’s impairment or combination of impairments meets or medically equals the criteria of a listing found at 20 C.F.R. Pt. 404, Subpt. P, App.1 and meets the duration requirement found at 20 C.F.R. §§ 404.1509 or 416.909, the ALJ will find the claimant disabled without considering the claimant’s age, education, and work experience.<sup>5</sup> 20 C.F.R. §§ 404.1520(d), 416.920(a)(4)(iii), (d).

**D. *Past Relevant Work***

The assessment of a claimant’s ability to perform past relevant work “reflect[s] the statute’s focus on the functional capacity retained by the claimant.” *Pass v. Chater*, 65 F.3d 1200, 1204 (4th Cir. 1995). At this step of the evaluation, the ALJ compares the

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<sup>5</sup>The Listing of Impairments is applicable to SSI claims pursuant to 20 C.F.R. §§ 416.911, 416.925.

claimant's residual functional capacity<sup>6</sup> with the physical and mental demands of the kind of work he has done in the past to determine whether the claimant has the residual functional capacity to do his past work. 20 C.F.R. §§ 404.1560(b), 416.960(b).

#### **E. Other Work**

As previously stated, once the ALJ finds that a claimant cannot return to her prior work, the burden of proof shifts to the Commissioner to establish that the claimant could perform other work that exists in the national economy. See 20 C.F.R. §§ 404.1520(f)–(g), 416.920(f)–(g); *Hunter v. Sullivan*, 993 F.2d 31, 35 (4th Cir. 1992). To meet this burden, the Commissioner may sometimes rely exclusively on the Medical-Vocational Guidelines (the “grids”). Exclusive reliance on the “grids” is appropriate where the claimant suffers primarily from an exertional impairment, without significant nonexertional factors.<sup>7</sup> 20 C.F.R. Pt. 404, Subpt. P, App. 2, § 200.00(e); *Gory v. Schweiker*, 712 F.2d 929, 930–31 (4th Cir. 1983) (stating that exclusive reliance on the grids is appropriate in cases involving exertional limitations). When a claimant suffers from both exertional and nonexertional limitations, the grids may serve only as guidelines. *Gory*, 712 F.2d at 931. In such a case, the Commissioner must use a vocational expert to establish the claimant's ability to perform

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<sup>6</sup>Residual functional capacity is “the most [a claimant] can still do despite [his] limitations.” 20 C.F.R. §§ 404.1545(a)(1), 416.945(a)(1).

<sup>7</sup>An exertional limitation is one that affects the claimant's ability to meet the strength requirements of jobs. 20 C.F.R. §§ 404.1569a(a), 416.969a(a). A nonexertional limitation is one that affects the ability to meet the demands of the job other than the strength demands. *Id.* Examples of nonexertional limitations include but are not limited to difficulty functioning because of being nervous, anxious, or depressed; difficulty maintaining attention or concentrating; difficulty understanding or remembering detailed instructions; difficulty seeing or hearing. 20 C.F.R. §§ 404.1569a(c)(1), 416.969a(c)(1).

other work. 20 C.F.R. §§ 404.1569a, 416.969a; see *Walker*, 889 F.2d at 49–50 (“Because we have found that the grids cannot be relied upon to show conclusively that claimant is not disabled, when the case is remanded it will be incumbent upon the [Commissioner] to prove by expert vocational testimony that despite the combination of exertional and nonexertional impairments, the claimant retains the ability to perform specific jobs which exist in the national economy.”). The purpose of using a vocational expert is “to assist the ALJ in determining whether there is work available in the national economy which this particular claimant can perform.” *Walker*, 889 F.2d at 50. For the vocational expert’s testimony to be relevant, “it must be based upon a consideration of all other evidence in the record, . . . and it must be in response to proper hypothetical questions which fairly set out all of claimant’s impairments.” *Id.* (citations omitted).

## **II. Developing the Record**

The ALJ has a duty to fully and fairly develop the record. See *Cook v. Heckler*, 783 F.2d 1168, 1173 (4th Cir. 1986). The ALJ is required to inquire fully into each relevant issue. *Snyder*, 307 F.2d at 520. The performance of this duty is particularly important when a claimant appears without counsel. *Marsh v. Harris*, 632 F.2d 296, 299 (4th Cir. 1980). In such circumstances, “the ALJ should scrupulously and conscientiously probe into, inquire of, and explore for all the relevant facts, . . . being especially diligent in ensuring that favorable as well as unfavorable facts and circumstances are elicited.” *Id.* (internal quotations and citations omitted).

## **III. Treating Physicians**

If a treating physician's opinion on the nature and severity of a claimant's impairments is "well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence" in the record, the ALJ must give it controlling weight. 20 C.F.R. §§ 404.1527(c)(2), 416.927(c)(2); see *Mastro v. Apfel*, 270 F.3d 171, 178 (4th Cir. 2001). The ALJ may discount a treating physician's opinion if it is unsupported or inconsistent with other evidence, i.e., when the treating physician's opinion does not warrant controlling weight, *Craig*, 76 F.3d at 590, but the ALJ must nevertheless assign a weight to the medical opinion based on the 1) length of the treatment relationship and the frequency of examination; 2) nature and extent of the treatment relationship; 3) supportability of the opinion; 4) consistency of the opinion with the record as a whole; 5) specialization of the physician; and 6) other factors which tend to support or contradict the opinion, 20 C.F.R. §§ 404.1527(c), 416.927(c). Similarly, where a treating physician has merely made conclusory statements, the ALJ may afford the opinion such weight as is supported by clinical or laboratory findings and other consistent evidence of a claimant's impairments. See *Craig*, 76 F.3d at 590 (holding there was sufficient evidence for the ALJ to reject the treating physician's conclusory opinion where the record contained contradictory evidence).

In any instance, a treating physician's opinion is generally entitled to more weight than a consulting physician's opinion. See *Mitchell v. Schweiker*, 699 F.2d 185, 187 (4th Cir. 1983) (stating that treating physician's opinion must be accorded great weight because "it reflects an expert judgment based on a continuing observation of the patient's condition

for a prolonged period of time”); 20 C.F.R. §§ 404.1527(c)(2), 416.927(c)(2). An ALJ determination coming down on the side of a non-examining, non-treating physician’s opinion can stand only if the medical testimony of examining and treating physicians goes both ways. *Smith v. Schweiker*, 795 F.2d 343, 346 (4th Cir. 1986). Further, the ALJ is required to review all of the medical findings and other evidence that support a medical source’s statement that a claimant is disabled. 20 C.F.R. §§ 404.1527(d), 416.927(d). However, the ALJ is responsible for making the ultimate determination about whether a claimant meets the statutory definition of disability. *Id.*

#### **IV. Medical Tests and Examinations**

The ALJ is required to order additional medical tests and exams only when a claimant’s medical sources do not give sufficient medical evidence about an impairment to determine whether the claimant is disabled. 20 C.F.R. §§ 404.1517, 416.917; *see also Conley v. Bowen*, 781 F.2d 143, 146 (8th Cir. 1986). The regulations are clear: a consultative examination is not required when there is sufficient medical evidence to make a determination on a claimant’s disability. 20 C.F.R. §§ 404.1517, 416.917. Under the regulations, however, the ALJ may determine that a consultative examination or other medical tests are necessary. *Id.*

#### **V. Pain**

Congress has determined that a claimant will not be considered disabled unless he furnishes medical and other evidence (e.g., medical signs and laboratory findings) showing the existence of a medical impairment that could reasonably be expected to produce the

pain or symptoms alleged. 42 U.S.C. § 423(d)(5)(A). In evaluating claims of disabling pain, the ALJ must proceed in a two-part analysis. *Morgan v. Barnhart*, 142 F. App'x 716, 723 (4th Cir. 2005) (unpublished opinion). First, “the ALJ must determine whether the claimant has produced medical evidence of a ‘medically determinable impairment which could reasonably be expected to produce . . . the actual pain, in the amount and degree, alleged by the claimant.’” *Id.* (quoting *Craig*, 76 F.3d at 594). Second, “if, and only if, the ALJ finds that the claimant has produced such evidence, the ALJ must then determine, as a matter of fact, whether the claimant’s underlying impairment *actually* causes her alleged pain.” *Id.* (emphasis in original) (citing *Craig*, 76 F.3d at 595).

Under the “pain rule” applicable within the United States Court of Appeals for the Fourth Circuit, it is well established that “subjective complaints of pain and physical discomfort could give rise to a finding of total disability, even when those complaints [a]re not supported fully by objective observable signs.” *Coffman v. Bowen*, 829 F.2d 514, 518 (4th Cir. 1987) (citing *Hicks v. Heckler*, 756 F.2d 1022, 1023 (4th Cir. 1985)). The ALJ must consider all of a claimant’s statements about his symptoms, including pain, and determine the extent to which the symptoms can reasonably be accepted as consistent with the objective medical evidence. 20 C.F.R. §§ 404.1528, 416.928. Indeed, the Fourth Circuit has rejected a rule which would require the claimant to demonstrate objective evidence of the pain itself, *Jenkins v. Sullivan*, 906 F.2d 107, 108 (4th Cir. 1990), and ordered the Commissioner to promulgate and distribute to all administrative law judges within the circuit a policy stating Fourth Circuit law on the subject of pain as a disabling

condition, *Hyatt v. Sullivan*, 899 F.2d 329, 336–37 (4th Cir. 1990). The Commissioner thereafter issued the following “Policy Interpretation Ruling”:

This Ruling supersedes, only in states within the Fourth Circuit (North Carolina, South Carolina, Maryland, Virginia and West Virginia), Social Security Ruling (SSR) 88-13, Titles II and XVI: Evaluation of Pain and Other Symptoms:

...

**FOURTH CIRCUIT STANDARD:** Once an underlying physical or [m]ental impairment that could reasonably be expected to cause pain is shown by medically acceptable objective evidence, such as clinical or laboratory diagnostic techniques, the adjudicator must evaluate the disabling effects of a disability claimant’s pain, even though its intensity or severity is shown only by subjective evidence. If an underlying impairment capable of causing pain is shown, subjective evidence of the pain, its intensity or degree can, by itself, support a finding of disability. Objective medical evidence of pain, its intensity or degree (i.e., manifestations of the functional effects of pain such as deteriorating nerve or muscle tissue, muscle spasm, or sensory or motor disruption), if available, should be obtained and considered. Because pain is not readily susceptible of objective proof, however, the absence of objective medical evidence of the intensity, severity, degree or functional effect of pain is not determinative.

SSR 90-1p, 55 Fed. Reg. 31,898-02, at 31,899 (Aug. 6, 1990). SSR 90-1p has since been superseded by SSR 96-7p, which is consistent with SSR 90-1p. See SSR 96-7p, 61 Fed. Reg. 34,483-01 (July 2, 1996). SSR 96-7p provides, “If an individual’s statements about pain or other symptoms are not substantiated by the objective medical evidence, the adjudicator must consider all of the evidence in the case record, including any statements by the individual and other persons concerning the individual’s symptoms.” *Id.* at 34,485; see also 20 C.F.R. §§ 404.1529(c)(1)–(c)(2), 416.929(c)(1)–(c)(2) (outlining evaluation of pain).



## **VI. Credibility**

The ALJ must make a credibility determination based upon all the evidence in the record. Where an ALJ decides not to credit a claimant's testimony about pain, the ALJ must articulate specific and adequate reasons for doing so, or the record must be obvious as to the credibility finding. *Hammond v. Heckler*, 765 F.2d 424, 426 (4th Cir. 1985). Although credibility determinations are generally left to the ALJ's discretion, such determinations should not be sustained if they are based on improper criteria. *Breeden*, 493 F.2d at 1010 ("We recognize that the administrative law judge has the unique advantage of having heard the testimony firsthand, and ordinarily we may not disturb credibility findings that are based on a witness's demeanor. But administrative findings based on oral testimony are not sacrosanct, and if it appears that credibility determinations are based on improper or irrational criteria they cannot be sustained.").

### **APPLICATION AND ANALYSIS**

#### **Credibility**

Plaintiff contends the ALJ failed to properly evaluate Plaintiff's credibility and failed to provide a sufficient explanation for her negative credibility determination. [Doc. 9 at 12–14.] Specifically, Plaintiff argues the ALJ erred in finding that Plaintiff can perform work simply because he can perform activities of daily living. [*Id.* at 14.] The Court agrees.

Whenever a claimant's statements about the intensity, persistence, or functionally limiting effects of pain or other symptoms are not substantiated by objective medical evidence, the ALJ must make a finding on the credibility of the claimant's statements based on a consideration of the entire case record. SSR 96-7p, 61 Fed. Reg. at 1. The credibility

determination “must contain specific reasons for the finding on credibility, supported by the evidence in the case record, and must be sufficiently specific to make clear to the individual and to any subsequent reviewers the weight the adjudicator gave to the individual’s statements and the reasons for that weight.” *Id.*; see also *Hammond*, 765 F.2d at 426 (stating that the ALJ’s credibility determination “must refer specifically to the evidence informing the ALJ’s conclusions”).

The following is a nonexhaustive list of relevant factors the ALJ should consider in evaluating a claimant’s symptoms, including pain: (1) the claimant’s daily activities; (2) the location, duration, frequency, and intensity of the claimant’s symptoms; (3) precipitating and aggravating factors; (4) the type, dosage, effectiveness, and side effects of any medication taken to alleviate the symptoms; (5) treatment, other than medication, received to relieve the symptoms; and (6) any measures the claimant has used to relieve the symptoms. 20 C.F.R. §§ 404.1529(c)(3), 416.929(c)(3). If the ALJ points to substantial evidence in support of his decision and adequately explains the reasons for his finding on the claimant’s credibility, the court must uphold the ALJ’s determination. *Mastro*, 270 F.3d at 176 (holding that the court is not to “undertake to re-weigh conflicting evidence, make credibility determinations, or substitute [its] judgment for that of” the agency).

“Pursuant to SSR 96-7p, in determining the credibility of a claimant’s statements, the ALJ must consider the entire case record including statements from ‘other persons about the symptoms and how they affect the individual.’” *Harris v. Astrue*, No. CA 1:11-2442-TMC-SVH, 2012 WL 6761333, at \*11 (D.S.C. Dec. 5, 2012), *adopted by* 2013 WL 30140 (D.S.C. Jan. 3, 2013) (quoting SSR 96-7p, 61 Fed. Reg. at 2). “Other persons may include non-medical sources such as spouses, parents, caregivers, siblings, other relatives,

friends, neighbors, and clergy.” *Id.* (citing 20 C.F.R. § 404.1513(d)). These lay witnesses “may provide [statements] about how the symptoms affect [a claimant's] activities of daily living and [her] ability to work . . . .” *Id.* (alterations in original) (citing 20 C.F.R. § 404.1529(a)).

An ALJ evaluating a claimant's subjective complaints “should refer specifically to the evidence informing the ALJ's conclusion.” *Hatcher v. Sec'y, Dep't of Health & Human Servs.*, 898 F.2d 21, 23 (4th Cir. 1989). This “duty of explanation . . . is especially crucial in evaluating pain, in part because the judgment is often a difficult one, and in part because the ALJ is somewhat constricted in choosing a decisional process.” *Id.* In addition, an ALJ's decision regarding a claimant's credibility “must contain specific reasons for the finding on credibility, supported by the evidence in the case record, and must be sufficiently specific to make clear to the individual and to any subsequent reviewers the weight the adjudicator gave to the individual's statements and the reasons for that weight.” SSR 96-7p, 61 Fed. Reg. at 4.

### **ALJ's Credibility Determination**

In making her credibility determination, the ALJ explained

At the hearing, the claimant testified that he lives with his fiancée and her 12-year-old daughter. His 5-year-old daughter comes to visit. When the children are in the home, the claimant can prepare meals for them in the microwave. His fiancée does the laundry and cooking. He stopped working in July 2009 after he was in a car accident. He was terminated because he missed too many days of work following the accident. The claimant received some unemployment benefits, which stopped when he provided his doctor's statement that he was unable to work. The claimant testified that his sickle cell prevents him from working due to severe aches and pains. The strenuous activity involved in working triggers shortness of breath and fatigue related to his sickle cell disease. Cold air

also triggers the pain. At times his sickle cell causes his muscles to cramp, such that he curls up in a fetal position and cannot get out, which involves severe pain. When this happens, five to seven times per year, he goes to the emergency room. He has to stay in the hospital from six hours to overnight. After one of these crises, it usually takes about 2 ½ weeks for the claimant to recover. He is prescribed Lortab for the pain. The claimant has had difficulty holding a job because of the days he misses during these crises.

After careful consideration of the evidence, the undersigned finds that the claimant's medically determinable impairments could reasonably be expected to cause some of the alleged symptoms; however, the claimant's statements concerning the intensity, persistence and limiting effects of these symptoms are not fully credible to the extent they are inconsistent with the above residual functional capacity assessment.

The claimant admitted in July 2010 and November 2010 that he was able to perform many household chores, but testified that he was unable to do more than warm up food in the microwave. His allegations of significant worsening of his symptoms are inconsistent with his complaints to treating physicians over time. Further, the claimant's testimony that he experiences five to seven sickle cell crises per year is inconsistent with the medical evidence of record, which documents about two such crises per year. The record reveals several emergency room visits, but does not contain a record of any inpatient hospitalization in the year prior to the January 2011 consultative examination, as the claimant reported. Although the inconsistent information provided by the claimant may not be the result of a conscious intention to mislead, nevertheless, the inconsistencies suggest that the information provided by the claimant generally may not be entirely reliable.

The claimant testified that he has avoided the use of narcotics and reported that he uses Lortab only six times per month, which suggests that his symptoms of pain may not be as severe as he has alleged in connection with this application.

[R. 27.]

## **Discussion**

While the ALJ articulated the correct legal standard for evaluating subjective complaints of pain, explaining the two-step process for evaluating a claimant's symptoms [R. 26], she failed to analyze Plaintiff's complaints under the Administration's regulations and controlling case law.

In *Hines v. Barnhart*, 453 F.3d 559, 561 (4th Cir. 2006), the Fourth Circuit Court of Appeals explained that SCD,<sup>8</sup> a blood disorder that principally afflicts individuals of African and Indian descent, leaves its victims easily fatigued and often suffering from episodes of acute pain. SCD is particularly insidious because it rarely produces the objective medical evidence that clinicians desire. In fact,

[p]atient[s] with SCD . . . are in an almost uniquely disadvantaged position from the point of view of pain management. The condition is life threatening at times, yet patients are healthy between sickling episodes. Some individuals are affected by painful episodes much more than others, and pain is often the only or main symptom of an acute episode of illness.

*Hines*, 453 F.3d at 560–561 (quoting James Elander & Kenny Midence, *A Review of Evidence About Factors Affecting Quality of Pain Management in Sickle Cell Disease*, 12(3) *The Clinical J. of Pain* 180–93 (Sept. 1996)). That court determined that once the plaintiff has shown both that he suffers from SCD and that SCD causes the type of pain complained of, he could thereafter “rely exclusively on subjective evidence to prove the second part of the test, *i.e.* that his pain is so continuous and/or so severe that it prevents him from working a full eight hour day.” *Id.* at 565. That court further examined the plaintiff's own testimony about the extent of his pain and its effect on his ability to function

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<sup>8</sup>SCD is also known as sickle cell anemia.

as well as testimony from the plaintiff's friend regarding the plaintiff's reduced energy level as a result of such pain. *Id.*

Upon considering the ALJ's credibility findings, it is unclear to the Court how the ALJ accounted for Plaintiff's pain symptoms in the RFC. That Plaintiff experiences pain due to SCD, has had at least two SCD crises per year requiring hospitalization,<sup>9</sup> and has had several emergency room visits each year,<sup>10</sup> are all factors that should have been expressly considered in determining Plaintiff's RFC. If the ALJ found that Plaintiff's statements about his pain experience, his SCD crises, and/or his recurring hospital visits were not credible, the Court is unable to glean the basis for this determination from the decision. Importantly, the ALJ failed to explain her consideration of Plaintiff's testimony that he has lost jobs in the past for missing work due to his SCD pain episodes [R. 47–48].

Further, while Plaintiff's ability to perform activities of daily living is an appropriate factor to consider in evaluating Plaintiff's credibility regarding pain, it is also important to consider whether Plaintiff can sustain effort over the length of a workday. The ALJ failed to provide such a discussion. Plaintiff testified that he has fatigue and pain even after he recovers from an SCD crises [R. 46–47], both of which may affect Plaintiff's ability to sustain effort over the length of a workday.

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<sup>9</sup>The record shows that Plaintiff was hospitalized and diagnosed as being in sickle cell crisis on August 22, 2011; January 2, 2012; and February 6, 2011. [R. 340–47, 375–79, 380–86.]

<sup>10</sup>The record shows that Plaintiff visited the emergency room on February 21, 2011; February 23, 2011; August 22, 2011; January 2, 2012; and February 6, 2012. [R. 302, 308, 340, 370, 375.]

Finally, there is no indication the ALJ considered Plaintiff's complaints of fatigue and pain other than in a hypothetical presented to the vocational expert ("VE"), which the ALJ ultimately rejected. The ALJ asked the VE whether there were jobs that existed in significant numbers in the national economy that Plaintiff could perform if he would be off task for up to two hours in an eight hour day due to interruptions from pain and fatigue and weakness. [R. 55.] The VE answered that there would be no work available. [*Id.*] The ALJ then determined these limitations did not apply to Plaintiff and found Plaintiff able to work based on a hypothetical person without limitations due to pain and fatigue. [R. 25–30.]

Here, the evidence cited by the ALJ in her credibility finding and the fact that Plaintiff can perform certain activities of daily living with no evidence of a worsening condition, does not support discrediting Plaintiff's pain complaints in their entirety. Accordingly, the Court is unable to find that the ALJ's credibility determination is supported by substantial evidence.

### **Plaintiff's Remaining Arguments**

Because the Court finds the ALJ's failure to properly explain her credibility determination is a sufficient basis to remand the case to the Commissioner, the Court declines to specifically address Plaintiff's additional allegations of error. However, upon remand, the Commissioner should take into consideration Plaintiff's remaining allegations of error, including Plaintiff's allegations that the ALJ failed to follow the treating physician rule in assigning "little weight" to the opinion of Plaintiff's treating physician, Dr. Lee, and "great weight" to the opinion of a single non-treating, non-examining state agency medical consultant .

**CONCLUSION AND RECOMMENDATION**

For the reasons set forth below, it is recommended that the decision of the Commissioner be REVERSED and REMANDED for administrative action consistent with this recommendation, pursuant to sentence four of 42 U.S.C. § 405(g).

IT IS SO RECOMMENDED.

s/Jacquelyn D. Austin  
United States Magistrate Judge

January 29, 2014  
Greenville, South Carolina